Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1367

LAWRENCE MALCOLM WELSH
a/k/a JOHNNIE WELSH,

Petitioner,

v

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

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NOW COMES, Donald Z. Ricard, Attorney for Petitioner, LAWRENCE MALCOLM WELSH a/k/a JOHNNIE WELSH, and prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered

in the above-entitled case on December 14, 1977.

CITATIONS TO OPINION BELOW

The Order and decision of the United States Court of Appeals for the Sixth Circuit was filed on December 14, 1977, and is delineated as Nos. 76-1877 and 76-1905. That Order and decision affirmed the conviction of the Petitioner upon jury verdict finding Defendant-Appellant guilty of conspiring to and of using extortionate means to collect money in violation of 18 U.S.C. § 894.

A copy of the opinion is included in the Appendix to this Petition.

JURISDICTION

The order and opinion of the United States Court of Appeals for the Sixth Circuit was filed on December 14, 1977. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

I. IN A CRIMINAL CASE, WHERE A DEFENDANT IS DEPRIVED OF A FULL AND COMPLETE TRANSCRIPT OF PROCEEDINGS, DUE TO THE INADVERTENT DESTRUCTION OF A CRUCIAL PORTION OF THE TRANSCRIPT, AND DEFENDANT HAD NEW COUNSEL FOR PURPOSES OF APPEAL, ARE DEFENDANT'S RIGHTS AS GUARANTEED UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION VIOLATED.

II. IS A REVERSAL, OR NEW TRIAL MANDATED WHERE A SUBSTANTIAL UNAVAILABLE PORTION OF THE TRIAL TRANSCRIPT IS ASSERTED TO CONTAIN ERROR WHICH AFFECTS DEFENDANT'S FUNDAMENTAL RIGHTS.

Petitioner answers in the affirmative.

The United States District Court for the Eastern District of Michigan, indicated that the answer would be in the negative.

The United States Court of Appeals did not have the available transcript to respond to said question, but adopted the opinion of the lower court.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision which this Petition involves is:

CONSTITUTION OF THE UNITED STATES, AMENDMENT V:

> "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property without due process of law. . ."

AMENDMENT VI:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . and to have the Assistance of Counsel for his defense."

STATEMENT OF FACTS

THE CHARGES AGAINST APPELLANT

Your Petitioner, Lawrence M. Welsh, was indicted by a grand jury with co-defendant, Robert E. Brown, in a three-count indictment charging Petitioner with violation of 18 U.S.C. § 894. Count I alleged that defendant Welsh used extortionate means to attempt to collect money from one Cecil Tucker. Count II pertained only to Robert E. Brown and charged that Brown aided, abetted and procured the services of defendant Welsh in the extortion attempt. Count III alleged a conspiracy between Welsh and Brown in the extortion attempt.

THE FACTS SURROUNDING THE DEBT

In December, 1972, Cecil Ernest Tucker, government's witness, was an independent electrical contractor for Michigan Bell Telephone Company. He conducted these endeavors as a principal and part owner of a business known as W. J. Dolan Associates, Incorporated. (Hereinafter "Dolan Company").

In the summer of 1972, the Company secured from the co-defendant, Robert Brown, a personal check for Three Thousand ($3,000.00) Dollars. The drawer of the check was Ethel Ringhorn, an aunt of Mr. Brown's. The check was deposited in the Dolan Company bank account. There were no repayments made

except that Cecil Tucker said he paid some of Mr. Brown's restaurant and bar tabs. Mr. Tucker, the government's witness, stated that this repayment amounted to $1,000.00 - $1,200.00.

The exact reason for Mr. Brown giving the money to the Dolan Company is not clear as it was sometimes stated by Mr. Brown to be the purchase price of one-third of the business of W. J. Dolan Associates, and at other times to have been a loan by Mr. Brown to the Dolan Company. Mr. Brown became in need of money and during the fall of 1974, made repeated attempts by telephone to Mr. Tucker to collect $16,000.00 which Mr. Brown claimed was his share of his

interest in the Dolan Company.

Mr. Brown was a supervisor for the Michigan Bell Telephone Company and feared he could not go to an attorney (his definition of legal means of collection) for collection of his monies as it might appear that he was in a conflict of interest situation regarding his employment and the work done by the Dolan Company for Michigan Bell Telephone Company.

CONVERSATIONS BETWEEN DEFENDANTS AND THE ALLEGED "VICTIM"

Mr. Brown knew Mr. Welsh and asked him for his help to recover his loan and/or his interest in the Dolan Company. There were two telephone conversations made between Mr. Tucker

and Mr. Welsh. These two telephone conversations, which are the subject matter of the government's indictment against the defendant, Mr. Welsh, occurred on December 20, 1974.

At the time of these calls, Mr. Tucker did not know Mr. Welsh. During the first conversation, Mr. Welsh indicated that he had a cancelled check from Mr. Brown, that Mr. Brown claimed that he owned one-third of the Dolan Company and that he (Mr. Welsh) wished to talk with Mr. Tucker about repayment. Mr. Tucker indicated that he would call Mr. Welsh back that evening to discuss the matter. Mr. Tucker then went to the Livonia police station at 4:00 p.m. on that same day.

After repeated attempts to call Mr. Welsh, Mr. Tucker contacted him at about 4:30 p.m. Immediately after this initial call, Mr. Tucker made a phone call back to Welsh from a local police department which conversation was recorded. That recorded conversation indicates a threat by Mr. Welsh if the money was not returned. When Mr. Brown was advised of this conversation by Mr. Tucker, he immediately told Mr. Welsh to have no further contact with Mr. Tucker. No evidence was ever presented that Mr. Welsh intended to carry out the threats.

The government witness, Cecil Tucker, never at any time met with defendant Welsh; the only contact Mr. Tucker had with Mr. Welsh consisted of

two telephone conversations on December 20, 1974. Mr. Tucker never again heard from Mr. Welsh after December 20, 1974 and Mr. Tucker never repaid any of the money he had borrowed from Mr. Brown.

ALLEGED "VICTIM'S" BACKGROUND

Mr. Tucker received a general discharge from the U. S. Air Force for emotional and psychiatric problems; he was receiving psychiatric treatment sporadically from the time of his U.S.A.F. discharge until June, 1975 and he is an alcoholic who participated in "payoffs" and "kickbacks" to an unnamed Michigan Bell employee while a principal of the Dolan Company. Mr. Tucker was granted immunity from prosecution in order to

give testimony at appellant's trial.

PORTIONS OF TRANSCRIPT UNAVAILABLE

Since the entire defense of Petitioner Welsh had been erased, which included the testimony of Sergeant Favor of the Livonia Police Department, the cross-examination of the co-defendant, Brown, together with the closing arguments, jury charges and other legal arguments, the Petitioner placed into his brief on appeal to the United States Court additional facts as supported by the affidavits of appellant Welsh's trial counsel, Austin Hirschhorn. In addition, Thomas Myers, an attorney licensed to practice law in the State of Michigan and Mr. Welsh's wife's

personal attorney, attended the entire trial and submitted affidavits respecting their recollections of those things said during the afore-described unrecorded sessions. His affidavit is likewise included in these additional facts.

An appeal was perfected to the United States Court of Appeals for the Sixth Circuit and arguments were had in open court on April 19, 1977.

At the time of oral argument, the Court determined that ommissions in the record (due to the court reporter's inadvertent erasure of tape-recorded testimony) were too substantial for further appeal consideration and did therefore order on April 26, 1977, that

the Trial Court attempt to settle the missing portions of the record in accordance with Federal Rule of Appellate Procedure 10 (c).

In accordance with this rule, Petitioner Welsh submitted a "Statement of Evidence and Proceedings" and Appellee, submitted the "Governments Statement of Objections and Amendments to Appellant's Statement of Evidence Pursuant to Rule 10, Federal Rules of Appellate Procedure".

On September 17, 1977, the Trial Court issued a "Statement under Rule 10(c) Rules of Appellate Procedure As Settled by the Court".

Thereafter, in accordance with an Order of the United States Court of

Appeals for the Sixth Circuit, Petitioner Welsh submitted a Supplemental Brief which, inter alia, discussed the divergence between the recollections of the District Court Judge, the Government and Petitioner's Affiants. The United States Court of Appeals then affirmed the lower court's conviction.

REASONS FOR GRANTING WRIT

I. IN A CRIMINAL CASE, WHERE A DEFENDANT IS DEPRIVED OF A FULL AND COMPLETE TRANSCRIPT OF PROCEEDINGS, DUE TO THE INADVERTENT DESTRUCTION OF A CRUCIAL PORTION OF THE TRANSCRIPT, AND DEFENDANT HAD NEW COUNSEL FOR PURPOSES OF APPEAL, ARE DEFENDANT'S RIGHTS AS GUARANTEED UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION VIOLATED.

The United States Court of Appeals for the Sixth Circuit, in its Order of December 14, 1977, stated:

> "The District Judge has made a certification to this Court concluding that no error prejudicial to the Appellants resulted from the final argument of the Prosecutor to the jury, or otherwise, during the period of the trial not reflected in the original transcript."

The United States Court of Appeals for the Sixth Circuit did not have the

advantage of the record in that it was inadvertently destroyed by the court reporter. The Court of Appeals could not determine whether the remarks by the Prosecutor were prejudicial. The lower court held that it made no prejudicial error, and this is one of the basic issues appealed. It is the Petitioner's contention that there was prejudicial error made that could not have been cured.

Petitioner contends that the presentation of his defense, the final arguments of the government and the Court's charge to the jury represented a critical stage of the judicial proceedings below. Counsel for Appellant on appeal to the United States

Court of Appeals for the Sixth Circuit being deprived of a full and inexorable transcript of the aforesaid proceedings could not exercise a full, effective and informed review of these critical proceedings. Instead said counsel was forced to specuate and extrapolate as to the cogency of the assigned errors - Such an unenviable alternative denied Petitioner the assistance of effective and meaningful representation.

The Court of Appeals, by adopting the position taken by the District Court without the benefit of the record, has replaced their duty to review all the record with the conclusion of the District Court. In other words, the Petitioner's right to an appeal was never granted in that the

Court of Appeals simply adopted the opinion of the District Judge, the very opinion which was appealed.

There has been a showing, through Affidavit and argument by the Petitioner, that there was error made in that the destroyed portion of transcript which affected Petitioner's substantial rights. The United States Court of Appeals for the Sixth Circuit did not have that specific portion of the record to determine whether or not there was error. It simply adopted the conclusion made by the District Judge as its own. The lower court's decision, however, is the primary reason for the appeal.

Furthermore, in the order of

December 14, 1977, the Appellate Court quoted as follows:

> "It being further concluded that there is sufficient evidence in the record to establish the essential elements of the crimes charged and to otherwise support the verdict of the jury."

The fact that there was sufficient evidence to meet the burden of a prima facie case on behalf of the Government is insufficient to affirm the verdict of the jury unless the Defendant's case is available to be reviewed by the Appellate Court. Furthermore, said reliance,upon "sufficient evidence", does not even meet the issue as to whether or not Petitioner was accorded Due Process of Law.

It is the contention of the Petitioner that the statements made by the Prosecutor were prejudicial and those statements are forever lost. It is the duty of the Court of Appeals to determine whether said statements were in fact incurably prejudicial. The District Court Judge determined that there was no prejudice, but the Petitioner disagrees and has exercised his right to an appeal to the United States Court of Appeals. Because said Court adopted the opinion of the District Court, without benefit of the transcript, he has been denied his rights guaranteed under the due process clause of the Fifth Amendment of the United States Constitution.

By accepting the conclusions of the District Court, the briefs, arguments and affidavits submitted by Petitioner's counsel have fallen on deaf ears. In the very least, Petitioner's affidavits and showing of crucial differences of recollections as to what may have been said during the afore-described critical stages should have demonstrated to the United States Court of Appeals for the Sixth Circuit that a reconstruction of the record under Rule 10(c) of the Federal Rules of Appellate Procedure was an inadequate and unconstitutionally ineffective means of appellate review.

In short, the right to assistance of counsel in non-trial but critical

stages of the criminal proceedings is worth very little if said counsel does not have available the record of proceedings that were contended to be violative of Petitioner's constitutional rights.

II. IS A REVERSAL, OR NEW TRIAL MANDATED WHERE A SUBSTANTIAL UNAVAILABLE PORTION OF THE TRIAL TRANSCRIPT IS ASSERTED TO CONTAIN ERROR WHICH AFFECTS DEFENDANT'S FUNDAMENTAL RIGHTS.

Petitioner answers in the affirmative.

The U.S. District Court indicated that the answer would be in the negative.

The United States Court of Appeals for the Sixth Circuit did not have the available transcript to respond to said question, but adopted the opinion of the lower court.

It is a recognized principal of federal jurisprudence that the absence

of a substantial portion of a trial transcript combined with a reasonable possibility of error, constitutes grounds for a reversal with remand for new trial; this is particularly true in a criminal case where the Appellant-Defendant has different counsel on appeal than in the trial court.

28 U.S.C. § 753 (b) 1964 provides:

> "One of the reporters appointed for each such [district] court shall attend at each session of the court...and record verbatim by shorthand or by mechanical means...(1) all proceedings in criminal cases had in open court."

Clearly, the purpose of this statute is not to keep court reporters employed nor to set forth a standard by

which to judge reporters; it has one purpose: <u>to preserve the right of the litigants to a fairly judged appeal on a complete record</u>.

Without going further, Petitioner contends, that the possibility of prejudice, particularly in a situation where it is alleged that the Government improperly commented on Petitioner's decision not to testify, coupled with the unavailability of the transcription of the asserted prejudicial comments, is a cogent reason for reversal. <u>Edwards v United States</u>, 374 F 2d 24,26 (F.N. 2) (10th Circuit 1967) Cert Denied, 389 U.S. 850 (1967).

The courts have emphasized that without a <u>complete</u> transcript,

Appellant's counsel is effectively barred from even seeking out error, objections thereto or plain error, and Appellant is thereby prejudiced.

Thus, in United States v Gregory, 472 F 2d 484 (5th Circuit 1973), it was stated in reliance on the case of Hardy v United States, 375 U.S. 277 (1964), that:

> "[In Hardy] the Supreme Court held that, where new counsel represented an indigent defendant on appeal, counsel must be furnished with a complete transcript of the trial. The Court stressed that the duty of representation of an appellate lawyer included the duty to search out plain error, and that nothing less than a complete transcript would suffice to accomplish this.

Following Hardy, this Court has reversed convictions in several cases where there

were omissions in the transcripts and where the appellants had new counsel on appeal. In United States v Rosa, 5th Circuit 1970, 434 F 2d 964, and Atilus v United States, 5th Circuit 1970, 425 F 2d 816, there were no records whatever of the trial proceedings. In United States v Garcia-Bonifascio, 5th Cir. 1971, 413 F 2d 914, the transcript omitted the government's closing argument, to which the defendant had objected at the trial. And in United States v Upshaw, 5th Cir. 1971, 448 F 2d 1218, the sole omission in the transcript was of the closing argument of defense counsel. There, three co-defendants had been tried together. There was no showing that objections to any of the statements had been made at trial. But on appeal, counsel for one of the defendants raised the possibility that trial counsel for the other defendants might have made prejudicial statements in the course of their closing arguments. This Court reversed, stating that to affirm a conviction in such circumstances, 'the court must be able to say affirmatively that no substantial rights of the appellant were adversely affected by the omissions

from the transcript; that is, it must exclude the possibility of any error other than harmless error'. 488 F 2d at 1224.

We are able to state affirmatively that no error other than harmless error was committed in this case. Lacking a transcript of the voir dire proceedings and the opening and closing statements, we cannot determine whether any objections during these proceedings may have been made by Gregory's lawyers. Nor are we able to exclude the possibility of plain error." (emphasis added) 472 F 2d at 486.

Similarly, in United States v Workcuff, 422 F 2d 700 (D.C. Cir. 1970), it was stated in reversing and remanding for new trial a criminal case where different counsel were employed on appeal and portions of the trial transcript were not available:

"The problem [of an incomplete transcript on appeal] is greatly exacerbated when, as

here, the attorney representing the appellant is different from the counsel who represented him at trial. The Supreme Court dealt with a similar handicap in Hardy v United States, 375 U.S. 277, 84 S.Ct. 424, 11 L. Ed 2d 331 (1964), a case involving a court's refusal to allow counsel for an indigent appellant to obtain the entire transcript of the trial proceedings. In reversing this decision, the Court observed that '[t]he right to notice "plain errors or defects" is illusory if no transcript is available at least to one whose lawyer on appeal enters the case after the trial is ended'. 375 U.S. at 280, 84 S. Ct. at 427; see also Tate v United States, 123 U.S. App. D.C. 261, 269-270, 359 F 2d 245, 253-254 (1966).

The difficulties inflicted upon appellant's counsel by an inadequate transcript of the trial proceedings are necessarily shared by the reviewing court. It is difficult enough in normal circumstances to appraise the propriety of the trial court's various actions on

> the basis of a cold printed record; when that record is replaced by the incomplete hearsay recollections of one of the parties, our review is turned into an exercise in creative imagination. 'It is a cardinal rule of appellate practice that the facts are those found in the record and not those found in the minds of the attorneys.'" (emphasis added, bracketed words added, certain citations omitted) 422 F 2d at 702.

Because of the court reporter's tape erasure, Petitioner's counsel herein has not been given opportunity to review a complete transcript and it is not only possible but likely that potential or actual error existed therein. While this alone is enough to justify a new trial as to Petitioner Welsh, even presuming for argument only the "new appellate counsel" factor did not exist,

a new trial for Petitioner Welsh would still be warranted.

Numerous federal appellate court decisions have recognized that the mere unavailability of a transcript for a significant portion of a trial, combined with a logical basis for error therein, requires reversal and remand for new trial.

The applicable test on this issue was explained in Calhoun v United States, 384 F 2d 180 (5th Cir. 1967) wherein it was stated at 184:

> "Failure to transcribe the entire court proceedings in violation of the statutory requirement is not reversible error per se. Therefore, where no claim is made that there is an error in the omitted portions of the record, failure to trans-

cribe such portion is not prejudicial as to require rev rsal...

But where the appellant does contend that errors were made, he may be prejudiced by the lack of a complete record in that the reviewing court may be unable to rule on the claimed errors. In such circumstances, the failure to record may constitute adequate grounds for reversal and ordering of a new trial." (emphasis added and citations omitted)

For reasons previously expressed, there is no justification to differentiate between failure to transcribe and inability to transcribe (as occurred here) in determining the outcome.

It should be further noted that the appellant in Calhoun, as Petitioner Welsh here, submitted that substantial error occurred in the government's

counsel's closing argument, and the Calhoun court remanded for new trial on that basis. And in Fowler v United States, 310 F 2d 66 (5th Cir. 1962), on facts even more similar to those in this appeal (it was alleged prosecutor made comments with implications relating to defendant's failure to take the witness stand), reversal was also granted. See also, Stephens v United States, 289 F 2d 308, 309 (5th Cir. 1961); Parrott v United States, 315 F 2d 46, 47 (10th Cir. 1963).

Several cases have also recognized the even greater danger of prejudice as a result of an unavailable portion of a trial transcript portion when the appellant has different counsel

on appeal than tried the case.

For the reasons expressed above, Petitioner Welsh submits he is entitled to a new trial.

In response to Petitioner Welsh's afore-described assignment of error, the United States Court of Appeals for the Sixth Circuit remanded the case to the District Court for settlement of the record under Rule 10(c) of the Federal Rules of Appellate Procedure. Petitioner admits that said rule provides a manner in which an appellant can bring before a reviewing court, matters which, though unrecorded, were assigned as error. Petitioner Welsh tried to comply with this rule but asserts that

he cannot agree with the United States Attorney to a settled record.

As a result, a Rule 10(c) statement was prepared by United States District Court Judge Cornelia G. Kennedy. Because Petitioner Welsh found a divergence between the Rule 10(c) statement submitted by the District Court and the respective versions submitted by the Government and Petitioner's Affiants, said Petitioner did, on November 4, 1977, submit to the United States Court of Appeals for the Sixth Circuit a supplemental brief pointing out the divergence between the recollections of the Court, the Government, and Petitioner Welsh's Affiants. It was indicated to the

Court of Appeals by said supplemental brief that the divergence was indicative of the very reasonable possibility that what did occur could not fairly be reconstructed. It was further indicated to the United States Court of Appeals for the Sixth Circuit that under the circumstances, and in accordance with the legal authorities set forth by Petitioner Welsh in his previous briefs to the Sixth Circuit, and essentially re-stated here, that an effective appeal was denied. A new trial was, therefore, requested to prevent manifest injustice.

Looking to the Order of the United States Court of Appeals for the Sixth Circuit, dated December 14, 1977,

Petitioner Welsh reasonably believes that the issue respecting the deficiency in the transcript was never directly answered. Instead, the United States Court of Appeals for the Sixth Circuit adopted the certification of United States District Court Judge Cornelia G. Kennedy, concluding that no prejudicial error to Petitioner herein occurred. Thus, Petitioner Welsh can only conclude that United States District Court Judge Cornelia Kennedy's conclusion that there was no error was substituted for a review.

A new trial is, therefore, required to prevent manifest injustice, inasmuch as the Appellate Court has been able to determine whether or not

the asserted errors were, in fact, prejudicial.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Honorable Court grant this Petition for Writ of Certiorari to review the Order and Judgment of the United States Court of Appeals for the Sixth Circuit.

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NOS. 76-1877, 76-1905

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA :

Plaintiff-Appellee :

v. :

LAWRENCE MALCOLM WELSH :

Defendant-Appellant : ORDER

:

UNITED STATES OF AMERICA

:

Plaintiff-Appellee

:

ROBERT E. BROWN

:

Defendant-Appellant

:

- - - - - - - -

Before: WEICK, PECK and MERRITT, Circuit Judges.

These appeals, perfected from judgments entered on jury verdicts finding defendants-appellants guilty of conspiring to and of using extortionate

means to collect money in violation of 18 U.S.C. § 894, have been submitted on the record on appeal and on the briefs and oral arguments of counsel. Pursuant to an order of remand, necessitated by a deficiency in the transcript of the trial court record, entered herein April 26, 1977, the district judge has made a certification to this court concluding that no error prejudicial to the appellants resulted from the final argument of the prosecutor to the jury, or otherwise, during the period of the trial not reflected in the original transcript. It being further concluded that there is sufficient evidence in the record to establish the essential elements of the crimes charged and to otherwise support the verdicts of the jury,

IT IS ORDERED that the judgments of the district court be and they hereby are affirmed.

ENTERED BY ORDER OF THE COURT

/s/
John P. Hehman, Clerk of the Court

(This order has been retyped to be attached as the Appendix to this Petition.)

FILED on December 14, 1977
John P. Hehman, Clerk

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, were forwarded to:

Solicitor General
of the United States
Department of Justice
Washington, D.C. 20530

by depositing same in the United States Government Mail, postage prepaid and clearly addressed on March 13, 1978.

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